Office-Supreme Court, U.S.
FILED
JUN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORDEN RESTAURANT CORPORATION,
Petitioner,

against

SONS OF THE REVOLUTION IN THE STATE OF NEW YORK,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SONS OF THE REVOLUTION IN THE STATE OF NEW YORK, INC.,

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BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Sons of the Revolution in the State of New York, Inc., respectfully submits this Brief in opposition to a petition by Norden Restaurant Corporation for issuance of a writ of certiorari to the Court of Appeals of the State of New York.

The writ is requested upon Petitioner's question whether the Court of Appeals' decision dated December 22, 1980 directing entry of partial summary judgment enjoining Petitioner's use of the name "Fraunces Tavern" so as to require compliance with the terms of a lease between it, as tenant, and Respondent, as landlord, for operation of a restaurant in Respondent's building known as Fraunces Tavern, would deprive Petitioner of property without due process of law such as is guaranteed under the Fourteenth Amendment to the United States Constitution. The Court of Appeals decision

comprises a factual determination under the summary judgment provision of New York's Civil Practice Law and Rules, §3212, that as between these parties Respondent owns the Fraunces Tavern name.

References are to the Record in the Court of Appeals, and are designated ("R__").

Respondent owns a building located at 54 Pearl Street in the City of New York (R. 29, 169-172), and known since the 18th Century as Fraunces Tavern (R. 93, 107, 173-198, 211, 214). Fraunces Tavern was built as a private residence in the first half of the 18th Centrury (R. 186, 192, 197, 214). It was converted to use as a tavern in the latter 1700's by a proprietor surnamed "Fraunces" (R. 186, 192, 197, 214), "dinners and suppers being served 'not only to the lodgers but to those who lived at a convenient distance.'" (R. 192). The building then came to be known, and has since been known as "Fraunces Tavern" (R. 186, 192, 197, 214). It is now designated an

historical landmark by the City of New York (R. 214), as is stated in the Lease between the parties (R. 93).

Respondent is a New York not-for-profit corporation organized (originally without corporate form) in Fraunces Tavern in the latter half of the 19th Century (R. 29, 51). Respondent acquired title to Fraunces Tavern in 1904 (R. 169-172); and the deed included the grant of the appurtenances to title of the premises (R. 171, 171A-171B). Respondent thereafter restored the building to, and has since maintained the building in a condition closely approximating the original tavern architecture and appearance (R. 29, 107, 186, 190, 196, 214). Respondent later acquired ownership of neighboring buildings (R. 246, 250), which are now interconnected with Fraunces Tavern (R. 29, cf. R.227). Respondent operates a museum showing Revolutionary War memorabilia in Fraunces Tavern and adjoining premises; and it also maintains its offices

there (R. 29, 193-194, 214). Respondent rents out portions of the Fraunces Tavern Complex. It has rented portions of Fraunces Tavern to several lessees since 1907 for operation of a tavern and restaurant in the premises (R. 173, 174, 180); and Petitioner is the current restaurant lessee, by Lease dated as of January 1, 1977 (R. 67).

Petitioner operates its restaurant under the name "Fraunces Tavern Restaurant" (R. 69) in the portions of Fraunces Tavern and adjoining buildings which it occupies pursuant to its Lease from Respondent (R. 66 et seq.). The Lease was negotiated to supplant a prior, unexpired lease between the parties (R. 256), and both parties were represented by counsel during the months of negotiations (R. 30-31). The Lease grants Petitioner a license to use the name in the "...Restaurant" form only, and requires further, written permission from Respondent if Petitioner seeks to use any other

name in the premises. The Lease states (R. 69):

> Section 3.04. the business conducted by Tenant in the premises is only to be conducted under the name 'Fraunces Tavern Restaurant' or such other name as Landlord shall from time to time approve in writing pursuant to the request of Tenant.

The Lease further provides that Petitioner's use of the "Fraunces Tavern" name extends no further than the scope of the Leasehold, in geography and in time (R. 107):

> Section 40.01.
>
> * * *
>
> The right to use the name 'Fraunces Tavern Restaurant' in connection with Tenant's business shall be limited to the restaurant business conducted in the premises and to no other business or location, and such right shall terminate upon the expiration or earlier termination of this Lease.

Lease Section 6.02 provides (R. 76), "[Respondent] reserves the right to name the Building."

The Lease contains provisions which give Respondent the right to control Petitioner's conduct of its restaurant business

in terms of quality, taste and fashion, provisions which are calculated to ensure that the operation is in keeping with the historic character of Fraunces Tavern (R. 93-96, 107, 157-58). Similar provisions have been actively enforced by Respondent against Petitioner under the prior lease as recently as the year preceding negotiation of the current Lease (R. 261-266).

Petitioner took over operation of the restaurant as a going concern, using the "Fraunces Tavern" name (R. 29-30, 227). The father of Petitioner's president was a prior restaurant lessee since about 1937 (R. 227). He, too, took over operation of the restaurant as a going concern, using the previously established "Fraunces Tavern" name (R. 29-30, 173-198, 211, 214). The record contains excerpts from restaurant and travel guides from the decades prior to 1937 which show that the restaurant was then operated under the name "Fraunces Tavern" (R. 178, 179, 181), and

further show that restaurant operations were conducted under the supervision and control of Respondent as early as 1925 (R. 197).

In October of 1977, during the aforesaid lease negotiations, but without informing Respondent, Petitioner filed an application to register the "Fraunces Tavern" name for Petitioner's benefit with the United States Patent and Trademark Office (R. 33-34, 199).

By letter dated June 19, 1978 (R. 124), Petitioner asked Respondent's approval of construction plans for a cloakroom, stating:

> The enclosure will have two display areas, one for cigars, the other for tasteful items offered for sale without a 'Fraunces Tavern' inscription, except the 'Fraunces Tavern' restaurant service plate.

By letter dated July 17, 1978 (R. 125), Petitioner approved the proposed construction plans subject to the following conditions:

1) Such construction and subsequent use would be without expense or liability to the Sons of the Revolution in the State of New York, Inc.;

2) Cigar and the "Fraunces Tavern" service plate which is presently sold can be offered for sale in the new display areas;

3) No other item will be displayed for sale unless prior specific written approval has been obtained from the Sons of the Revolution in the State of New York, Inc., in accordance with the terms of the Lease, which approval may be granted or withheld in our sole discretion;

4) No items except the above-mentioned service plate will bear the labels or inscriptions which include the words "Fraunces Tavern".

Respondent continued in its letter to reaffirm its rights to use and to license the use of the "Fraunces Tavern" name on merchandise, and to exercise control over the type of merchandise which would be "appropriate to Fraunces Tavern". Petitioner was requested to signify agreement by executing a copy of Respondent's letter.

Respondent discovered Petitioner's federal service mark application when a trademark attorney told it that notice thereof was published in the Official Gazette of the Patent Office on August 22, 1978 (R. 34). Respondent thereafter sought to oppose Petitioner's said application (R. 34); but the opposition papers were unfortunately rejected for late filing.

Under cover letter dated September 21, 1978 (R. 147), Petitioner responded to Respondent's July 17, 1978 letter by offering an "interim agreement," which it formulated (R. 145-146) by crossing out Respondent's conditions 3 and 4 (quoted above). Respondent replied a week later by rejecting Petitioner's proposed changes (R. 148).

SUMMARY OF ARGUMENT

The writ of certiorari should not issue, because no issue of constitituional dimension is presented in this case. The decision of the Court of Appeals of the State of New York is based upon its legal interpretation of a contract between the parties, and is founded upon consistently applied principles of common law and, to the limited extent applicable, of federal trademark law. New York's summary judgment statute permits submission of pertinent proofs by all parties and is constitutionally unobjectionable. No property right is invaded; and no exceptional circumstance appears such as might warrant this Court's de novo review of the facts and law.

ARGUMENT

POINT I.

THE PARTIAL SUMMARY DETERMINATION HEREIN IS BASED ON UNDISPUTED, SUFFICIENT FACTS SHOWN OF RECORD

The record of this commercial landlord and tenant case established the operative facts necessary to a final determination of ownership, beyond or without dispute. The Lease between the parties is in writing, between corporations, and executed by the parties to be charged. There is no allegation of fraud, mistake or adhesion in the making of that contract. Respondent's title to the building is a matter of public record. The history of Respondent's restoral of the building and the conduct of the restaurant business therein under Respondent's aegis prior to any connection of Petitioner with the premises is shown by ancient, undisputed publications. The Court of Appeals' decision, based upon its interpretation and holding that the Lease unambiguously places ownership of the

Fraunces Tavern name with Respondent, is consistent with the usual practices of the New York courts on summary judgment motions, and is in accord with the federal precedents for summary determination of trademark disputes.

Where the rights and duties of the parties are set forth in a written, binding document, it is appropriate to summarily determine a dispute concerning the same. It is for the court to ascertain whether the document in question suffers from ambiguity; and, if not, the interpretation thereof is made by the court as a matter of law. George Backer Management Corp. v. Acme Quilting Co, Inc., 46 N.Y. 2d 211 (1978); Breed v. Ins. Co. of North America, 46 N.Y. 2d 358 (1978); Long Island R.R. Co. v. Northville Industries Corp., 41 N.Y. 2d 455, 461 (1977); Senrow Concession, Inc. v. Shelton Properties, Inc., 10 N.Y. 2d 320 (1961); Bethlehem Steel Co. v. Turner Const. Co., 2 N.Y. 2d 456 (1957); Janos v. Peck, 21 A.D. 2d 529, 251 N.Y.S. 2d 254 (App.

Div., 1st Dept., 1964); aff'd 15 N.Y. 2d 509 (1964).

Where a party enters into a written contract and accepts the benefits provided to it therein, it should not be surprised when the document is held to govern and define the extent of its rights. Petitioner did not argue below that the Lease terms quoted in the Statement of the Case, above, and in the Court of Appeals decision would be ambiguous in any respect. The interpretation Petitioner offers at pp. 18-22 was not even suggested by Petitioner until it moved for reargument to the Court of Appeals. The suggested interpretation violates grammer, common sense, and the canons of contract construction customarily employed in the courts of New York. Corhill v. S.D. Plants, Inc., 9 N.Y. 2d 595, 599 (1961); General Electric Co. v. Hatzel & Buchler, Inc., 19 A.D. 2d 40, 43 (App. Div., 1st Dept., 1963); aff'd. 14 N.Y. 2d 639 (1964).

Likewise, contractual or similar consensual bases for decision are consistently held to warrant summary determination of trademark disputes in the federal courts of appeal, even, in a proper case, whether the opposition is placed upon an allegation of usage, Wells Cargo, Inc., v. Wells Cargo, Inc., 606 F. 2d 961 (C.C.P.A., 1979); Danskin, Inc. v. Dan River, Inc., 498 F. 2d 1386 (C.C.P.A., 1974); Beer Nuts, Inc. v. King Nut Co., 477 F. 2d 326 (6 Cir., 1973), cert.d., 414 U.S. 858 (1973), or even upon a federal registration, Spencer v. VDO Instruments, Ltd., 232 F. Supp. 735, 739 (E.D. Mich., 1964), aff'd., 352 F. 2d 784 (6 Cir., 1965). State law controls the issue of trademark ownership in actions based on common law. Parfums LeGalion v. Jean Patou, Inc., 495 F. 2d 1265 (2 Cir., 1974); United States Jaycees v. San Francisco Jr. Chamber of Commerce, 354 F. Supp. 61 (N.D. Cal., 1972), aff'd 513 F. 2d 1226 (9 Cir., 1975); Turner v.

H.M.H. Publishing Co., 380 F.2d 224 (5th Cir., 1967).

That a licensee's use of a mark or tradename is attributed to its licensor; and that a licensee is estopped from disproving its licensor's ownership of the licensed name are principles commonly applied in federal and New York state courts. Beer Nuts, Inc., supra; Heaton Distrib. Co., Inc. v. Union Tank Car Co., 387 F.2d 477 (8th Cir., 1967); cf., Professional Golfers Ass'n v. Bankers Life & Cas. Co., 514 F.2d 665, 668-669 (5th Cir., 1975); cf., Pike v. Ruby Foo's Den, 232 F.2d 683, 686 (D.C. Cir., 1956); Distillerie Flli Ramazotti, S.P.S. v. Banfi Products, Inc., 52 Misc.2d 593, 276 N.Y.S.2d 413 (Sup., N.Y. Co., 1966), aff'd, 27 A.D.2d 905, 280 N.Y.S.2d 892 (App. Div., 1st Dept., 1967); Laurer Brewing Co. v. Ehresman, 127 App. Div. 486, 111 N.Y.S. 266 (App. Div., 3rd Dept., 1908), Stopgop Realty Co. v. Marie Antoinette

Hotel Co., 217 App. Div. 555, 217 N.Y.S.2d 106 (App. Div., 1st Dept., 1926). The latter principle is derived from the ancient rule of property law by which a lessee is estopped from disputing his lessor's title. Farnsworth v. Boro Gas & Oil Co., 216 N.Y. 40, 46-47 (1915); Tilyou v. Reynolds, 101 N.Y. 558 (1888); Vernan v. Smith, 15 N.Y. 327 (1857).

POINT II.

THE SUMMARY JUDGMENT STATUTE OF NEW YORK IS NOT UNCONSTITUTIONAL

New York's summary judgment statute, C.P.L.R. §3212, provides, as do the laws of most of its sister states, for the expeditious determination of judicial controversies where it appears, upon sufficient opportunity for the parties to set forth purportedly disputed issues and to marshall the evidence pro and con, that there is no material issue of fact to be determined. Such procedures have been

upheld as constitutional even as against the right of jury trial specifically guaranteed in the Seventh Amendment to the United States Constitution (of course, that guaranty does not apply in this equity case, relegating Petitioner to its present invocation of the general provisions of the Fourteenth Amendment). Ex Parte Petersen, 253 U.S. 300, 310, 64 L. ed.2d 919, 40 S.Ct. 543 (1920):

> "No one is entitled in a civil case to a trial by jury unless and except so far as there are issues of fact to be determined."

The constitutionality of New York's summary judgment statute has been upheld against challenge under both the Seventh Amendment guaranty of right to trial by jury and the Fourteenth Amendment guaranty against deprivation of property without due process of law. Stewart v. Ahrens, 273 N.Y. 591 (1937); Diamond v. Davis, 38 N.Y.S.2d 103, 130 (Sup., N.Y. Co., 1942); aff'd 265 App. Div. 919, 39 N.Y.S.2d 412; aff'd 292 N.Y. 552 (1944).

New York's statute is similar in prerequisites and effect to federal summary judgment provisions, F.R.C.P. Rule 56, as applied by this Court. First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 20 L.ed.2d 569, 88 S.Ct. 1575 (1968).

POINT III.

THE RESOLUTION OF THIS ACTION ON PRINCIPLES OF STATE COMMON LAW AND PROCEDURE THREATENS NO CONSTITUTIONALLY PROTECTED INTEREST

The instant petition requests this Court to conduct a de novo review of the record, and to independently determine the correctness and wisdom of the decision of the highest court of the State of New York, rendered upon the evidence submitted by the parties in pursuit of New York's procedural statutes upon application of substantive principles of New York's common law. This Court reserves the power to review the

decisions of state courts, so as to ensure that constitituional guaranties are not violated. This case does not present the slightest occasion for exercise of that rarely invoked power of review. The four cases cited at p.50 of Petitioner's argument stand firmly in support of that conclusion in result, in reasoning and in the several included aspects of federalist policy. Board of Regents v. Roth, 408 U.S. 564, 33 L.ed.2d 548, 96 S.Ct. 2701, (1972); Perry v. Sinderman, 408 U.S. 593, 33 L.ed 570, 92 S.Ct. 2694 (1972); Milkwagon Drivers Union v. Meadowmoor Dairies, 32 U.S. 287, 85 L.ed 836, 61 S.Ct. 552 (1941); Lee v. Central of Georgia R.R. Co., 252 U.S. 109, 64 L.ed 482, 40 S.Ct. 254 (1920).

Board of Regents v. Roth and Perry v. Sinderman were considered together upon assertions by college teachers that their state employers had terminated their employment without specifying any charges or providing a

hearing, and that such traversed rights of free speech and property protected under the Fourteenth Amendment. In Roth's case, where the contract of the teacher provided him no right to further employment, summary judgment dismissing the claims under the due process guaranties of the Fourteenth Amendment was directed to be entered by this Court, holding at 408 U.S. 564, 577, 33 L.3d 2d 548, 560:

> To have a property interest in a benefit, a person must have more than a need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and support claims of entitlement to those benefits.

As Justice Berger, concurring in Perry, summed up the central holding of both cases, at 408 U.S. 593, 603; 33 L.ed 2d 570, 581; ". . . The

relationship between a state institution and one of its teachers is essentially a matter of state concern and state law."

In the Milkwagon Drivers Union case, this Court rejected the argument that an injunction against peaceful picketing in a labor dispute marked by repeated instances of violence would violate the Fourteenth Amendment guaranty of freedom of speech holding, at 312 U.S. 287, 294, 85 L.ed 836, 841:

> It is not for us to make an independent evaluation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that is so without warrant as to be a palpable invasion of the constitutional guaranty here invoked.

Likewise, the Court continued at 312 U.S. 287, 296, 85 L.ed 836, 843:

> . . . we do not have supervisory power over state practice, provided such practice is not used to evade constitutional guaranties. See, Fox River Paper Co. v. Railroad Comm., 274 U.S. 651, 655, 71 L.ed 1279, 1283, 47 S.Ct. 669; Long Sault Development Co. v. Call, 242 U.S. 272, 277, 61 L.ed.

294, 299, 37 S.Ct. 79. We are here concerned with the power and not the wisdom of its exercise.

The Lee case held that the state's determination to try a claim under the federal railroad employees compensation statutes separately from a related tort claim did not violate any constitutionally protected rights to trial of the issues. The basis of the decision was that the state courts ordinarily make the final determination concerning procedure and practice in matters within their jurisdictions.

The instant case involves a dispute between private parties arising out of their contractual relationship. The decision below is based upon the documented terms of that relationship, upon proofs submitted to the state court in conformance with New York's regular procedures. The decision of the state's highest court is true to the undisputed proofs submitted, and based upon principles of

property and contract law long established in New York. There is not the least hint that the Court of Appeals' determination could invade any constitionally protected interest, much less such a "palpable invasion" as would warrant independent review by this Court. There is no element of the case itself or the relationship of the parties which presents inherent constitutional concern. The petition should be denied, and costs and disbursements should be awarded to respondent.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE PETITION SHOULD BE DENIED.

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